Supreme Court, U.S.
FILED
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No. 01-979

IN THE

Supreme Court of the United States

JAMES M. GIBBS, JR.,

Petitioner,

v.

MORGANITE INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Morganite Incorporated* is a wholly owned subsidiary of Morgan Industries, Inc., which is a wholly owned subsidiary of The Morgan Crucible Company, PLC, a publicly traded corporation registered with the London Stock Exchange.

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* Morganite Incorporated is incorrectly identified as "Morganite, Inc." in the petition.

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COUNTER STATEMENT OF CASE

A. Procedural History.

Petitioner is a former employee of Morganite, filed this lawsuit on May 10, 1999, in the United States District Court for the Eastern District of North Carolina. The Complaint attempted to state claims against Morganite, Inc. and eleven individual employees of Morganite for (1) unlawful discriminatory termination on the basis of race under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. § 1981; (2) unlawful discrimination under the Americans with Disabilities Act of 1990; (3) unlawful discriminatory failure to promote on the basis of race and disability; (4) unlawful retaliatory termination; and (5) a racially hostile work environment. (*Id.*).

On June 1, 2000, Morganite filed a Motion for Summary Judgment with supporting materials.

On July 10, 2000 Petitioner filed a response in opposition to Morganite's Motion for Summary Judgment. Part of Petitioner's opposition was the Affidavit of James M. Gibbs, Jr., with attachments that included the transcript of a hearing held on September 19, 1997, before an appeals referee of the North Carolina Security Commission ("NCESC") regarding Petitioner's application for unemployment benefits. On July 19, 2000, Morganite filed a motion to strike certain portions of the Affidavit and to strike the transcript of the unemployment hearing.

On October 6, 2000, the district court entered a Judgment and Order granting Morganite's motion for summary judgment and granting the motion to strike (Pet. Petition App. pp. 4a-47a).

On July 30, 2001, the Court of Appeals issued an unpublished per curiam opinion affirming the district court's judgment "on the reasoning of the district court" (Pet. Petition App. pp. 1a-3a). Petitioner filed a petition for rehearing with the Court of Appeals. On October 1, 2001, the petition was denied.

B. Facts.

Morganite is a manufacturer of carbon and commutator products located in Dunn, North Carolina. Morganite hired Petitioner in March 1987 as a Tool and Die Maker, Grade C (JA 212).[1] Petitioner sharpened dyes and other tools using a bench grinder (JA 440). Petitioner remained a Tool and Die Maker, Grade C, throughout the remainder of his employment (JA 215). Petitioner has variously described his race as "Black" and as Native American (JA 437-441).

During the ten years that he worked for the Company, Petitioner was dissatisfied with virtually every aspect of his employment (JA 469-527). Petitioner frequently was belligerent, uncooperative and confrontational with his supervisors (JA 482, 486). Petitioner also frequently refused requests to work overtime or to work on unscheduled days (JA 474, 484). Petitioner viewed requests from his supervisors to work more quickly as "harassment" (JA 482). Petitioner called the Company's management "slave drivers" (JA 481).

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1. Respondent believes the Petition contains numerous misstatements of important facts from the proceedings below. Accordingly, Respondent has attempted to cite to the record below in support of its factual assertions. References to the Joint Appendix filed with the Court of Appeals are designated as "JA" followed by a page reference. References to other materials filed with the Court of Appeals are designated by the record docket number in the Court of Appeals' docket.

Despite Petitioner's perceptions of unfair treatment and his poor attitude, his job performance evaluations remained steady and even improved near the end of his employment (JA 444-466, 531-532). Additionally, Petitioner received regular pay increases throughout his employment (JA 214-15).

Petitioner alleged that he had medical conditions related to his back and legs that amounted to "disabilities". He had surgery on the varicose veins in 1978, nine years before he became employed with Morganite (JA 168). Petitioner's medical records show that he never had any other significant complaints about the problems with his legs after 1978.

Petitioner had back surgery for herniated disk in May 1988. (JA 173). Petitioner's medical records show that he had no significant complaints of back problems again after 1988 (JA 383-435, 533, 544-83).

Despite his complaints about various aches and pains, Petitioner admitted that he was able to perform his job. Petitioner characterized his attendance during his last three years of employment as "excellent" (JA 179).

Petitioner claims that he asked management officials for reasonable accommodations for his medical conditions. He alleged that in February 1997, he presented a letter to Blizzard specifically requesting three accommodations (JA 203, 436). Petitioner admitted, however, that two of the three accommodations he requested were essentially unnecessary since the length of his shift remained 8 hours and because Morganite already provided rubber mats for employees to stand on while working (JA 204-207). Petitioner claimed that Morganite refused his third requested

accommodation; to split his long break into 2 or 3 shorter breaks. Petitioner admitted, however, that he had 3 daily breaks and that he could use them to sit or "do whatever [he] wanted to do" (JA 205).

Morganite disciplined Petitioner several times during his employment for confrontational, and at times, threatening behavior. The Company twice reprimanded Petitioner for refusing to work overtime (JA 474-77). In November 1990, Morganite reprimanded Petitioner for a confrontation with Bert Jenkins, Tool Room Supervisor (JA 918-921, 928).

In 1995, David Cooper, General Manager, reprimanded Petitioner for his behavior in a meeting with Roger Bone, Production Supervisor, and Russell Lee, Tool Room Supervisor (JA 489). In January 1996, Bone and Lee issued Petitioner a final counseling for threatening conduct Petitioner displayed during a meeting Bone held with Petitioner to discuss his 1995 performance review (JA 467, 708, 875-77). In conjunction with this counseling, Petitioner signed a written "Terms of Continued Employment" (JA 263-64, 468). The "Terms of Continued Employment" provided that Petitioner would not "use or imply any language, acts or behavior of a threatening or intimidating nature to any employee of Morganite" and provided that any such conduct would result in termination. On January 17, 1996, Petitioner signed the "Terms of Continued Employment" under protest (*Id.*).

On March 4, 1997, Mon Vonkchalee, a supervisor, met with Petitioner to give him a disciplinary counseling for being late to work on March 3 (JA 310-12, 516-17). During the meeting, Petitioner told Vonkchalee "I'm tired of this shit" and "I'm not signing any damn reprimand" (JA 312, 516).

Petitioner walked out of Vonkchalee's office (*Id.*). A short time later, Petitioner returned to Vonkchalee's office (JA 314-15). During this encounter, Petitioner asked Vonkchalee "am I the damned one, as usual?" and told him "the commutators supervisors don't seem to know a damn thing about leadership and moral conduct on the job, but they seem to know everything about the bottom line and how to screw someone." (JA 517). After Petitioner's second tirade, Vonkchalee crumpled up the written warning and threw it in the trash can (*Id.*; JA 795-98).

Vonkchalee reported the incidents to Roger Bone. Bone advised Vonkchalee to review the situation with Doug Blizzard, Director of Human Resources (JA 798, 801, 808). Vonkchalee discussed the incident with Blizzard (JA 698-700, 711).

On March 12, 1997, Vonkchalee met with Petitioner and gave him a second level disciplinary warning for being tardy on March 3, 1997 (JA 530). Shortly after the meeting, Petitioner confronted Vonkchalee about the warning (JA 521, 807-810, 852-56). Vonkchalee felt threatened by the encounter and reported it to Roger Bone and Doug Blizzard (JA 698, 699-701, 712, 823, 834-35, 842, 852-56). Bone and Blizzard decided to terminate Petitioner's employment (JA 697-700). On March 13, 1997, Morganite terminated Petitioner's employment for engaging in intimidating and threatening conduct towards management employees (JA 437). Petitioner admitted that Bone and Blizzard told him "that [he] was discharged for displaying intimidating and threatening behavior toward management employees" and for "violating the terms of a 1996 document referred to as: *Regarding Terms of Continued Employment.*" (JA 438,440).

Shortly after his termination, Petitioner filed charges of discrimination with the Equal Employment Opportunity Commission (JA 437, 438). In conjunction with the charges, Petitioner filed a sworn Affidavit (JA 439-441). In the Affidavit, Petitioner conceded that he believed the true reason for his termination was his "strong willed and outspoken" personality and not discriminatory bias (*Id.*).

Petitioner's theory in this lawsuit was that the alleged mistreatment he suffered was motivated by the Company's disapproval of his relationship with a white woman (JA 19, 233-36, 287-89, 332-33, 346). Petitioner alleges that sometime in May or early June 1987, David Cooper told him that employees at the plant disapproved of his relationship with a Caucasian woman (JA 470-71)[2] Petitioner claims Cooper told him to keep a low profile on the relationship, but that he disregarded Cooper's request (JA 470). The subject of Petitioner's girlfriend was never raised again by any Morganite official (JA 471-527). Despite this, Petitioner believed that "everything that happened to [him] went back to" his alleged conversation with Cooper (JA 233).

It is undisputed that David Cooper was not involved in the decision to terminate Petitioner (JA 607). Petitioner admitted he does not even know whether Roger Bone or Doug Blizzard knew his girlfriend's race, and he did not remember ever speaking to either of them about it (JA 373-75).

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2. Cooper vehemently denies that he had any such conversation with Petitioner (JA 615).

REASON FOR DENYING THE WRIT

I. THE FIRST QUESTION PRESENTED BY THE PETITION WAS NOT ADDRESSED BY THE COURT OF APPEALS.

Petitioner seeks review of the Court of Appeals' decision regarding his claims for retaliation (Pet. Petition p. 13). He apparently has not sought review of his claims for race and disability discrimination. Petitioner argues that the Court of Appeals imposed an improper burden on him at the pretext stage of its analysis by requiring him to prove that Morganite's employees did not feel threatened by his conduct (Pet. Petition p. 14). In deciding the retaliation claims, however, the district court never reached the stage of addressing whether Morganite's reason for terminating Petitioner was a pretext for unlawful retaliation (Pet. Petition App. pp. 26a-32a). Rather, the court held that Petitioner failed to establish a "causal link" between his alleged protected activity and Petitioner's discharge because: (a) Cooper's alleged statement occurred ten years prior to Petitioner's discharge, (b) Cooper was not involved in Petitioner's discharge, and (c) Petitioner's threats to report Morganite to the EEOC and NAACP started over five years prior to his discharge (*Id.*). Accordingly, the district court held that Petitioner failed to establish a prima facie case of retaliation, and it did not address Petitioner's evidence of pretext with regard to the retaliation claims (Pet. Petition App. p. 32a).

Additionally, Petitioner did not make the "improper burden" argument in the Court of Appeals with regard to his claims of retaliation (Brief of Appellant, pp. 37a-40a). Rather, Petitioner argued only that the district court erroneously concluded that he failed to establish a prima facie case of

retaliation (*Id.*). Since Petitioner failed to raise an argument regarding pretext in the Court of Appeals, and the Court of Appeals did not consider the issue, the issue is not properly before this Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in the court of appeals is not properly before us).

II. THE FIRST QUESTION PRESENTED BY THE PETITION DOES NOT RAISE A SUBSTANTIAL QUESTION WORTHY OF THIS COURT'S REVIEW.

The first question presented by the Petition in this matter amounts to nothing more than a request for this Court to conduct another de novo review of the district court's judgment. The first question does not present the type of issue that warrants review by the United States Supreme Court.

This Court rightfully exercises its discretion to review the matters brought before it only for compelling reasons. Rule 10 of the Rules of the Supreme Court of the United States provides guidance regarding the types of questions that might warrant the granting of a writ of certiorari. None of those types of questions are raised by the first question in the Petition. Rather, Petitioner seeks another review of the district court's order granting summary judgment. By way of example, Petitioner makes the following assertions regarding the types of issues on which he seeks review:

> Mr. Gibbs forecasted sufficient evidence to establish a prima facie case of retaliation under Title VII and [§] 1981 . . . (Pet. Petition p. 13).
>
> To reach this decision, the Court of Appeals permitted the district court to substitute its view of the weight of the evidence for the jury's view and failed to draw all reasonable inferences in Mr. Gibbs favor (Pet. Petition p. 15).
>
> The Court did not give sufficient weight to Mr. Gibbs' prima facie evidence and evidence of pretext, and it failed to draw all reasonable inferences in Mr. Gibbs' favor (Pet. Petition p. 19).

These statements show the true nature of the questions Petitioner raises in the Petition.

The district court properly stated the summary judgment standard in its decision (Pet. Petition App. pp. 17a-20a). Petitioner's real argument is that the district court engaged in fact finding and failed to view the facts in the light most favorable to him. This was the thrust of his argument to the Court of Appeals. His attempt to rehash that argument should not prompt this Court's review.

Petitioner also argues that the district court erred "by incorporating additional subjective standards to the Plaintiff's burden of proof" on his retaliation claims (Pet. Petition p. 13). As noted above, this argument is false and misleading. The district court dismissed the retaliation claims solely on the grounds that Petitioner failed to establish

a prima facie case (Pet. Petition App. pp. 26a-32a). The court did not reach nor consider the issue of Morganite's non-retaliatory reasons for its actions (*Id.*).

Rule 10 counsels that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." These are precisely the types of errors upon which Petitioner seeks review in his first question in the Petition. The Petition does not raise a substantial question that warrants this Court's review and should be denied.

III. THE COURT OF APPEALS DID NOT IMPOSE AN ADDITIONAL, UNFAIR BURDEN ON PETITIONER. RATHER, THE COURT HELD THAT PETITIONER FAILED TO PRODUCE EVIDENCE THAT CALLED INTO QUESTION MORGANITE'S LEGITIMATE, NON-DISCRIMINATORY REASONS FOR TERMINATING PETITIONER.

Although not properly presented by the Petition, Petitioner argues that the Court of Appeals by adopting the district court's reasoning, improperly required him to prove that Morganite's managers did not feel threatened by his conduct in order to raise an issue of pretext.[3] Even assuming, however, that the issue has been presented by the Petition, the Petitioner's assertion is incorrect.

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3. The district court engaged in the pretext analysis only in deciding Petitioner's claims for race discrimination. (Pet. Petition App. pp. 21 a-26 a). The district court did not reach the pretext issue in deciding Petitioner's retaliation claims, which apparently is the only portion of the district court's order challenged in the Petition (Pet. Petition p. 13).

The district court held that Petitioner failed to raise a genuine issue of fact regarding Morganite's explanation that it terminated Petitioner for engaging in threatening conduct. It did not find as fact that Petitioner made threats nor did it require Petitioner to prove that the employees did not feel threatened. The district court held:

> Although plaintiff may have made allegations in the course of these proceedings, which this court is bound to construe favorably toward him, that the allegations regarding his threatening and intimidating behavior were untrue, he has not presented evidence that Morganite's asserted belief in those allegations was unworthy of credence. Indeed, as evidenced by his affidavit, plaintiff suggests that he believes that the allegedly threatening behavior was actually the reason for his discharge. Accordingly, plaintiff has not begun to show that defendant's proffered reason for his discharge was pretextual as required by *St. Mary's* and *Reeves*, and his discriminatory discharge claim must fail.

(Pet. Petition App. pp. 25a-26a).

Significantly, Petitioner appears to concede that the district court properly analyzed the pretext question, stating in the Petition:

> Mr. Gibbs may demonstrate pretext by showing "either that a discriminatory reason more than likely motivated the employer's proffered explanation or . . . that the employer's proffered explanation is unworthy of credence." *Hardy v.*

> *S.F. Phosphates, LC.*, 185 F.3d 1076 (10th Cir. 1999). The pertinent question to determine pretext is not whether the employer was right to think the employee engaged in misconduct, but whether that belief was genuine or pretextual." *Id.* at 1080.

(Pet. Petition p. 22).

The district court's analysis of the pretext question was consistent with the existing precedent in the Fourth Circuit and other federal circuits. In a case alleging unlawful motivation, the critical issue is not whether Plaintiff in fact engaged in threatening conduct, but rather whether the decision makers had a good faith belief that he engaged in such conduct. *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir.), *cert. denied*, 531 U.S. 875 (2000). The Fourth Circuit Court of Appeals has held "[a] reason honestly described but poorly founded is not a pretext, as that term is used in the law of discrimination." *Holder v. City of Raleigh*, 867 F.2d 823, 829 (4th Cir. 1989) [*quoting Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987)]; *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Employers retain the right to make business decisions, even ill-advised ones, so long as they do not violate the law. *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 277 (4th Cir. 1995).

The Eleventh Circuit Court of Appeals' decision in *Elrod v. Sears & Roebuck*, is instructive on the burden of establishing pretext in this type of case. In *Elrod*, the plaintiff was discharged for sexually harassing a female employee. The plaintiff sued Sears alleging that he was discharged because of his age. At trial, plaintiff attempted to prove he

had not harassed anyone. In addressing the correctness of the company's proffered reasons for the plaintiff's discharge, the Court of Appeals stated that:

> Much of Elrod's proof at trial centered around whether Elrod was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for purposes of this opinion that the complaining employees interviewed by Rives were lying through their teeth. The inquiry of the ADEA is limited to whether [the management official who made the termination decision] believed that Elrod was guilty of harassment, and if so, whether his belief was the reason behind Elrod's discharge.

939 F.2d at 1470 (citations and footnote omitted).

Petitioner raised no genuine issue of fact that Bone and Blizzard did not honestly, and in good faith, rely on Vonkchalee's report that Petitioner had threatened Vonkchalee in deciding to terminate Petitioner. Petitioner admitted that Bone and Blizzard told him that he was being terminated for threatening behavior. The notes and documentation prepared by Vonkchalee and Blizzard at the time of the incidents in March 1997, reflect the threatening nature of Petitioner's conduct and the reasons for terminating him. Petitioner has offered no evidence that would call into question the legitimacy of Morganite's belief that Vonkchalee felt threatened and that it terminated Petitioner based on that belief. Accordingly, the Court of Appeals properly affirmed the district court's order and opinion dismissing Petitioner's claim for racially discriminatory termination, and the Petition should be denied.

IV. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S RULING THAT THE STATUTORY PRIVILEGE UNDER NORTH CAROLINA GENERAL STATUTE SECTION 96-4(t)(5) PRECLUDES THE INTRODUCTION OF TESTIMONY FROM PETITIONER'S EMPLOYMENT SECURITY COMMISSION HEARING.

In opposition to Morganite's motion for summary judgment, Petitioner sought to introduce testimony from an unemployment benefits hearing held before the North Carolina Employment Security Commission ("NCESC"). The district court adopted North Carolina's statutory privilege against the use of such testimony in any civil proceedings and struck the NCESC testimony. The Court of Appeals adopted the district court's reasoning and affirmed. Petitioner asserts that this holding was erroneous because it hampered Petitioner's ability to establish pretext in his Title VII claim.

Section 96-4(t)(5) of the North Carolina General Statute provides as follows:

> All letters, reports, communication, or any other matters, either oral or written, including any testimony at any hearing, from the employer or employee to each other or to the Commission or any of its agents, representatives, or employees, which letters, reports, or other communication shall have been written, sent, delivered, or made in connection with the requirements of the administration of [Chapter 96 of the North Carolina General Statutes], shall be absolutely privileged communication in any civil or criminal proceedings . . .

A federal court may adopt the state privilege as federal common law when no controlling federal law on that issue exists. *United States v. Cartledge*, 928 F.2d 93, 95-96 (4th Cir. 1991). No controlling federal law exists regarding the use of testimony from a state unemployment benefits hearing in a subsequent civil action for discrimination. *EEOC v. Illinois Dep't of Employment Sec.*, 995 F.2d 106, 107 (7th Cir. 1993). In deciding whether to adopt North Carolina's statutory privilege, the district court was required to balance the important state interests behind the privilege against the countervailing federal interests. *Cartledge*, 928 F.2d at 96; *Hartsell v. Duplex Products, Inc.*, 895 F. Supp. 100, 102-03 (W.D.N.C. 1995), *aff'd*, 123 F.3d 766 (4th Cir. 1997).

The Court of Appeals affirmed the district court's ruling that the important state interests advanced by North Carolina's privilege outweighed the competing federal interests in this case. The district court correctly noted that the privilege encourages full disclosure from claimants and employers and prevents parties from conducting free discovery before litigation. *See Hartsell*, 895 F. Supp. at 103 ("ESC hearings do not investigate Title VII allegations, and ESC participants do not expect their testimony to appear later in a subsequent federal Title VII proceeding").

Contrary to Petitioner's assertion, the fact that Petitioner had already initiated his Title VII proceedings by the time the NCESC hearing was held does not change the parties' expectations. An NCESC hearing is held solely to resolve the question of whether an individual's employment was terminated for "misconduct," "substantial fault" or "without good cause attributable to the employer" as those terms are defined in North Carolina's statute. N.C. Gen. Stat.

§§ 96-14(1), (2), and (2)(a). The hearings are not required to "conform to common law or statutory rules of evidence or technical or formal rules of procedure." N.C. Gen. Stat. § 96-15(c). Issues and allegations peculiar to federal employment discrimination laws are not investigated, evaluated, or discussed in NCESC hearings. The witnesses in the NCESC hearing had an expectation of privilege precisely because of the prohibitions contained in N.C.G.S. § 96-(4)(t)(5) against the use of that testimony in a subsequent lawsuit. The primary purpose of the privilege is to encourage full disclosure in a contested unemployment proceeding without fear that something may later be used against you in a civil or criminal action. The statutory privilege is aimed in part at preventing the hearings from becoming full-blown mini-trials on unrelated civil claims with the consequent increases in time and expense to the parties and the certain erosion of the privilege altogether.

In contrast to the important state interests advanced by the privilege, the competing federal interest is not harmed by the adoption of the state privilege in federal court. The district court agreed that the federal government had an irrefutable interest in enforcing its anti-discrimination laws and the absence of a federal privilege comparable to the state privilege effectively promotes the disclosure of probative evidence in a Title VII suit. Nevertheless, the district court properly adopted the state privilege in Petitioner's case because the probative value of the evidence Petitioner sought to introduce was very limited. Petitioner deposed the witnesses who testified at the unemployment hearing and had access to his own deposition testimony as well. The district court properly concluded that the NCESC testimony Petitioner sought to rely on was duplicative of the extensive deposition testimony taken and that there was no need to

abrogate the state's statutory privilege for such a limited purpose. As the court in *Hartsell* noted, "[t]he desire to impeach witnesses does not outweigh the state interest in protecting confidential unemployment proceedings." *Hartsell*, 895 F. Supp. at 102.

Finally, Petitioner's due process is not compromised by adopting the important state privilege and precluding Petitioner from introducing the NCESC testimony. As stated above, Petitioner deposed the witnesses who testified at the NCESC hearing and had ample opportunity to uncover impeachment evidence. Petitioner himself contends that "there exists sufficient evidence in the depositions to support each claim that is being pursued by [Petitioner]. . . ." (Pet. Petition p. 29). Consequently, the district court did not violate Petitioner's right of due process and did not abuse its discretion by striking the NCESC testimony.

The Court of Appeals correctly affirmed the district court's ruling on the issue of the state privilege, and that decision does not warrant review by this Court.

IV. THE STRICKEN NCESC TESTIMONY WAS NOT INCONSISTENT WITH DEPOSITION TESTIMONY.

Even if the NCESC testimony was improperly stricken by the court, it made no difference in the result of the case. The testimony offered by the Morganite officials at the NCESC hearing was completely consistent both with the reason given Petitioner for his termination and the testimony of the same officials in their depositions. The NCESC testimony would not have aided Petitioner in establishing pretext.

Petitioner admitted that he was told he was terminated "for violating the terms of a 1996 document" by "displaying intimidating and threatening behavior toward management employees" (JA 438, 440).

Blizzard and Vonkchalee testified for Morganite at the NCESC hearing. Blizzard testified at the hearing as follows:

> A: "[Gibbs] was terminated by Roger Bone, our plant manager on March 13, 1997 for violating that written agreement that was signed basically the year before that . . .
>
> Q: And again, on March 13, 1997, when he was let go for the alleged violation of this agreement he signed, to whom were those comments supposedly spoken?
>
> A: Mr. [Mon] Vonkchalee.

(JA 942, 952). This testimony was consistent with Blizzard's deposition testimony in this case and Blizzard's contemporaneous notes made in March 1997 (JA 698-99, 711, 712). Blizzard testified in his deposition as follows:

> Q: Do you recall what he was terminated for?
>
> A: For making threatening comments towards Mon [Vonkachalee]–toward the supervisor.

(JA 698).

In the NCESC hearing, Vonkchalee presented a detailed account of the threatening conduct that led to Petitioner's discharge (JA 956-67). Vonkchalee testified that he felt threatened and reported the threats to Bone and Blizzard (JA 960, 962-63, 965-66). Vonkchalee's testimony in the NCESC hearing was identical to his deposition testimony and his written notes made in March 1997 (JA 794-812, 852-56).

Accordingly, even if it had not been struck by the district court, the NCESC testimony would not have aided Plaintiff and would not have changed the result in this case. The Petition should be denied.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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